

January 30, 2019

To: Secretary of Education Betsy DeVos
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

CC: Assistant Secretary for Civil Rights Kenneth Marcus

Re: Docket ID ED-2018-OCR-0064-0001

Dear Secretary DeVos,

We, the 76 undersigned college and university student body presidents representing 32 states, write to express serious concerns with the recently proposed Title IX regulations.

In our roles, we have continuously seen institutions fail survivors of sexual violence. It is our stance that these proposed regulations will limit the ability of students to receive the uninterrupted education guaranteed to them by Title IX of the Education Amendments of 1972 and will allow institutions to turn even more of a blind eye toward instances of sexual violence within our campus communities.

In particular, we have highlighted the ten most problematic provisions that we oppose:

1. Section 106.44(e) of the proposed regulations suggests narrowing the definition of sexual harassment to only behavior that is so "severe, pervasive, and objectively offensive that it denies a person equal access to the recipient's (or institution's) education program or activity." If implemented, this definition would limit the ability of a student to seek assistance from their school until their access to education is completely denied, rather than allowing students to seek assistance and for the university to correct problematic behavior before the trauma and abuse escalates from a point where a student's educational access has been limited.
2. Section 106.44(e) proposes limiting a school's responsibility to respond to off-campus or online sexual harassment / assault, stating that a school must only respond to "conduct that occurs within its education program or activity." This section is deeply concerning given that at many of our institutions a majority of students live off-campus and many social gatherings take place off-campus.
3. We are concerned that Section 106.45 (b)(4)(i) will allow universities or colleges to use a higher standard of evidence for reports of sexual harassment/assault, despite the preponderance of the evidence standard being consistent with civil rights laws.¹ We urge

¹ Title IX & the preponderance of the evidence: a white paper 7-8 (Aug. 7, 2016), available at <http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-8.7.16.pdf>.

the Department of Education to require the preponderance of evidence standard across the board, so that all students, regardless of what school or state they are in, have access to an equitable process.

4. We are opposed to Section 106.45(c)(3)(viii). Requiring schools to "provide both parties an opportunity to inspect and review any evidence obtained as a part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in making a determination regarding responsibility" means that confidential information such as mental health history or medical records may be shared with respondents, even if irrelevant to the case. We fear that the possibility of this information being improperly shared will deter survivors from reporting and getting access to resources.
5. By permitting live cross-examinations as suggested in Section 106.45(B)(3), we are concerned that students will be unnecessarily re-traumatized.² We acknowledge the need for panels to make a determination about the credibility of a complainant, however, we believe this can be sufficiently accomplished through written questions provided ahead of time.
6. In Section 106.44(e)(4), the proposed regulations would change the current mechanism for interim accommodations by forcing survivors to bear the burden of the accommodation, which we are concerned will decrease the number of survivors who will report their assault. For example, previously survivors were able to request that their perpetrator be moved out of a class or dorm as part of an interim accommodation. Requiring a survivor to move instead further victimizes them and disincentivizes them from utilizing university resources.
7. Limiting university/college employees who must respond to sexual harassment/assault reports to "Title IX Coordinators or an official who has authority to institute corrective measures," per Section 106.44(e)(5)), will decrease institutional accountability at a time when our campuses desperately need more. We feel that this proposal could enable institutional cover-up of sexual harassment/assault if a student reports to another employee they trust who is not required to report to the Title IX Office and help the student get access to resources and additional support. We are also worried that this will increase the institutional betrayal experienced by our students.³
8. We are concerned that institutions will be allowed to incorporate mediation into the Title IX process per Section 106.45(b)(6). We are aware of instances where students have felt pressured by administrators to enter into mediation, even when one of the parties involved may not truly wish to go through mediation. Instead, we urge the Department to consider restorative justice practices, which we have seen an increased demand for on our campuses in recent years, as they involve perpetrators taking responsibility for harm that they have caused.⁴

² Zydervelt, S., Zajac, R., Kaladelfos, A. and Westera, N. (2016). Lawyers' Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s? *British Journal of Criminology*, 57(3), 551–569.

³ Smith, C. P., & Freyd, J. J. (2013). Dangerous safe havens: Institutional betrayal exacerbates sexual trauma. *Journal of Traumatic Stress*, 26, 119–124.

⁴ Koss, M. P., Wilgus, J. K., & Williamsen, K. M. (2014). Campus sexual misconduct: Restorative justice approaches to enhance compliance with Title IX guidance. *Trauma, Violence, & Abuse*, 15, 242–257.

9. Section 106.45(b)(1)(iv) creates a problematic presumption of innocence for the accused, which creates a process where a survivor is automatically thought to be lying. We are concerned that the application of this criminal standard into a non-criminal proceeding will have a chilling effect on reporting and that survivors will be disincentivized to report their sexual assault.
10. Under Section 106.45(B)(5) of the proposed regulations, the appeals process, if offered, does not allow the complainant to appeal a sanction on the grounds of leniency. We've seen many instances where respondents who have been found responsible of sexual assault have been given sanctions where they have to write a book report or perform community service. Given this pattern of leniency at institutions, we believe that this new process would unduly favor respondents as they would still be able to appeal sanctions that they believe are too punitive, creating an inequitable process.

For these reasons and many more, we believe that the proposed Title IX Regulations protect institutions from any semblance of accountability while restricting the rights of students. The most marginalized members of our campuses including LGBTQ folks⁵⁶, women of color⁷⁸, and students with disabilities experience much higher rates of sexual violence than the one in five women⁹ statistic that is frequently shown in the headlines. These are the members of our community who also stand to be most disproportionately harmed by the proposed regulations. Amidst powerful movements such as #MeToo and #TimesUp, the proposed Title IX regulations will take our nation and our institutions a step back.

⁵ https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf

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<https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf>

⁷ <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf>

⁸ https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm?s_cid=ss6308a1_e

⁹ <https://www.kff.org/other/poll-finding/survey-of-current-and-recent-college-students-on-sexual-assault/>

Signed,

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